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No. 402

In the

Supreme Court of the United States

OCTOBER TERM, 1968

CARL DI GIOVANNI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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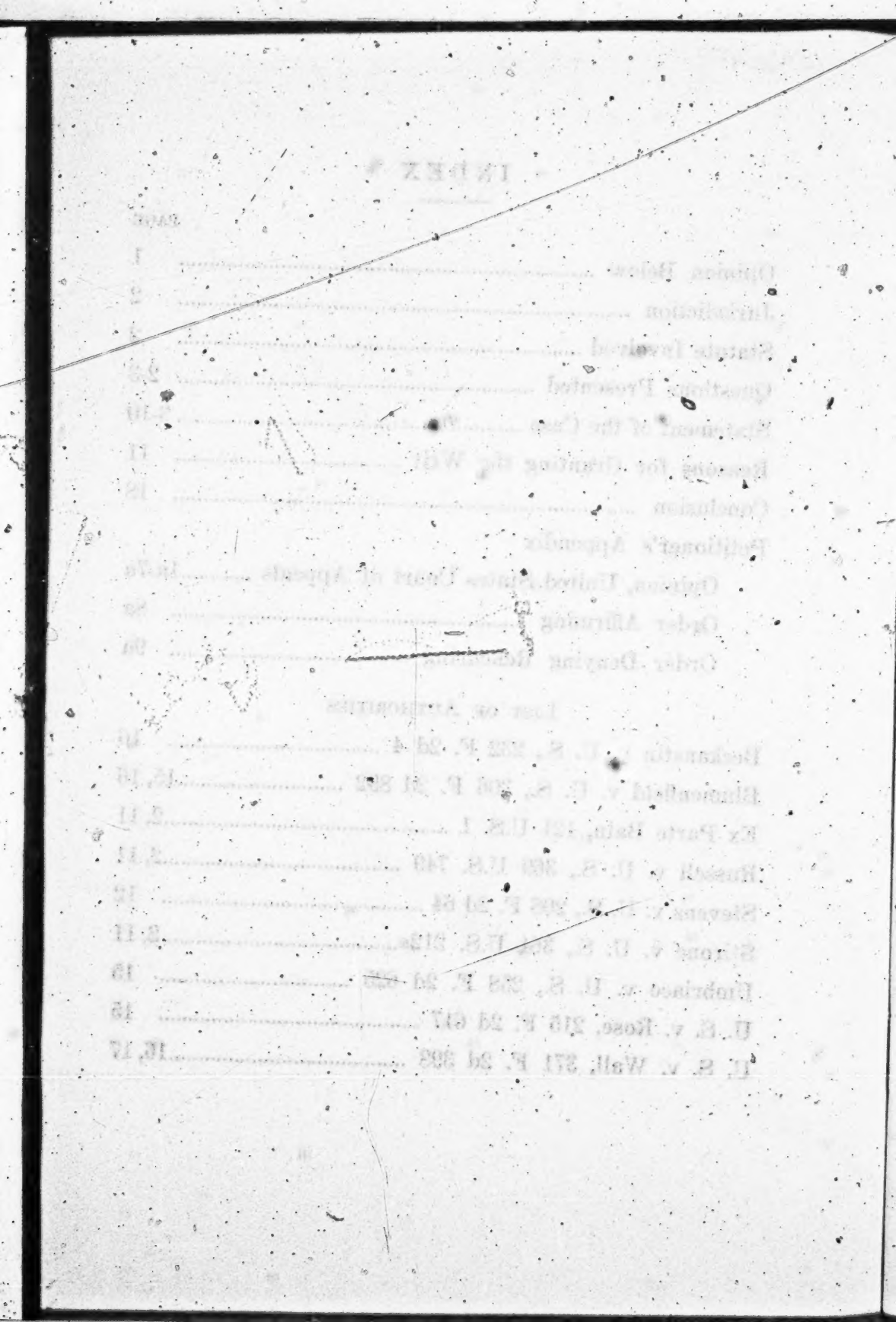
INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	2-3
Statement of the Case	3-10
Reasons for Granting the Writ	11
Conclusion	18
Petitioner's Appendix	
Opinion, United States Court of Appeals	1a-7a
Order Affirming	8a
Order Denying Rehearing	9a

List of Authorities

Beckanstin v. U. S., 232 F. 2d 4	16
Blumenfield v. U. S., 306 F. 2d 892	15, 16
Ex Parte Bain, 121 U.S. 1	2, 11
Russell v. U. S., 369 U.S. 749	2, 11
Stevens v. U. S., 206 F. 2d 64	12
Stirone v. U. S., 361 U.S. 212	2, 11
Umbriaco v. U. S., 258 F. 2d 625	15
U. S. v. Rose, 215 F. 2d 617	15
U. S. v. Wall, 371 F. 2d 398	16, 17



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To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Carl DiGiovanni, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction for perjury in violation of Title 18, United States Code, Section 1621, in the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this Petition. (App. A, p. App. 1).

JURISDICTION

Judgment of the Court of Appeals was entered on June 10, 1968. (App. B., p. App. 8a). A timely petition for rehearing was denied on July 15, 1968 (App. C., p. App. 9a). The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

STATUTE INVOLVED

§ 1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c. 645, 62 Stat. 733; Oct. 3, 1964, Pub.L. 88-619, § 1, 78 Stat. 995.

QUESTIONS PRESENTED

1. Where a perjury indictment charged the Petitioner with falsely testifying before a Grand Jury that he did not "give a statement" to insurance investigators which was literally truthfully under the Petitioner's understanding of the word statement, does *Ex parte Bain*, 121 U.S. 1, *Stirone* v. *United States*, 361 U.S. 212, and *Russell* v. *U.S.*, 369 U.S. 749, permit proof of specific answers to other questions not charged in the indictment as false but

accepted as proof of the charge actually made in the indictment?

2. Did not the Court of Appeals recognize amendment in order to convict where, in the same opinion, it later stated that the same consideration which it relied upon to sustain conviction under the charge could not lawfully be considered by the jury?

3. Did not the trial court err in refusing to give an instruction tendered by Petitioner intending to place before the jury the defense of mistake as to the meaning of the word "statement", and further, compounding this trial error, did not the Court of Appeals err in holding this "appellant's (petitioner) understanding of the word statement is irrelevant," thus negativing the element of intent?

STATEMENT OF THE CASE

The Petitioner Carl DiGiovanni appealed from a judgment of conviction entered May 2, 1967 following a jury trial. The single-count indictment charged that Petitioner, duly sworn as a witness, willfully and falsely "testified in substance [before a federal grand jury on March 29, 1966] that he did not give a statement to a court reporter and an investigator of Allstate Insurance Company on February 21, 1963, or any other time concerning his automobile accident on January 16, 1963, in Chicago, Illinois." Petitioner was committed to the custody of the Attorney General for one year. He is currently at liberty on bond.

Most of the facts are undisputed. On January 16, 1963, Petitioner was involved in a traffic accident in Chicago with an insured of Allstate Insurance Company. Shortly thereafter, Allstate and its insured received letters from a firm of attorneys purporting to represent Petitioner in

a claim for property damage and personal injuries sustained in the accident. In late February, Allstate received a form, entitled "Statement of Property Damage," signed by Petitioner. An answer on the form indicated that had Petitioner not been injured in the accident.

There is a dispute concerning the events of February 20 and 21, 1963. An investigator for Allstate testified that he called petitioner on February 20 and petitioner told him he was not injured in the accident. The investigator further testified that on February 21 he, with a court reported, visited petitioner at the barber shop where the latter was employed. He questioned petitioner while the latter was cutting hair, and the court reporter recorded the conversation. The substance of the conversation, as related by the investigator and shown by the transcript of the reporter's notes, was that petitioner suffered no injuries in the accident, that he only wished to be compensated for the property damage to his car, and that his attorneys wanted to make a "big deal" out of it. The investigator's testimony was corroborated in part.

Petitioner testified at trial that on February 21, 1963 two men who did not identify themselves and were unknown to him came into the barber shop where he worked. His version of the conversation with the men was that they asked him whether he was injured and that he told them he was working and would talk to them if they came back later.

Petitioner was subpoenaed by the March, 1966 federal grand jury for the Northern District of Illinois, which was investigating mail fraud by claimants, doctors and lawyers in presenting automobile insurance claims. Petitioner appeared on March 29, 1966. He was accompanied by his attorney, who waited outside the jury room. He

was questioned concerning his traffic accident, his injuries and his consultations with a doctor and his lawyers. He then denied that he gave a statement to the Allstate investigator. The indictment charging him with perjury was returned June 2, 1966.

The indictment alleged that on March 29, 1966 Carl DiGiovanni, the petitioner herein, having taken an oath before the said Grand Jury as a witness did then and there willfully and knowingly and contrary to oath state certain material matters which he did not believe to be true. The indictment charges these matters to be:

> "On March 29, 1966 said defendant testified in substance that he did not give a statement to a court reporter and an investigator of All State Insurance Company on February 21, 1963, or any other time concerning his automobile accident on January 16, 1963, in Chicago, Illinois.
>
> "The said testimony was false, as said defendant then and there well knew, that on February 21, 1963, while he was in Chicago, Illinois, defendant gave a statement to a court reporter and an investigator of Allstate Insurance Company concerning his automobile accident on January 16, 1963 in Chicago, Illinois."

The Petitioner filed motions to dismiss, and for discovery and inspection, which were denied. The petitioner also filed a motion to produce the Grand Jury Minutes out of which the alleged perjury arose. This motion was granted. Upon the receipt of the minutes the petitioner, on November 15, 1963, filed a second motion to dismiss. A basis of this motion to dismiss was that an improper and unintelligibe warning was given to the petitioner upon his being questioned before the Grand Jury as a "putative defendant" and his testimony should have been stricken and the indictment dismissed.

Aside from the improper and confusing warning there was no indication to the petitioner that the jury had evidence of facts which, under the circumstances, tended to demonstrate that the petitioner had "given a statement" to insurance investigators. However, no effort was made to clarify what was meant by the words "give a statement". The petitioner freely conceded in the course of his interrogation before the Grand Jury that he talked to the men but he didn't know who they were.

What the petitioner DiGiovanni has stated before the Grand Jury is a part of this record and is reproduced in the Appendix filed in the U. S. Court of Appeals for the Seventh Circuit at pages 75 through 86. The exact questions put to him were as follows (App. 78):

"Q. Mr. DiGiovanni, when you were a barber, where is your shop?

"A. 4753 North Puaski.

"Q. Were you located there on February 21, 1963?

"A. Yes, sir.

"Q. Sir, on February 21, 1963, a statement was taken from you by an insurance investigator from Allstate Insurance Company?

"A. No. Two men came into my office and asked me if I was injured. I said 'I am working. I can't talk now.' Will you come back later, and they never came back.

"Q. Are you denying that you gave a statement to investigators from Allstate Insurance on February 21, 1963?

"A. I gave them no statement. I don't know who they were.

"Q. Did you ever give a statement to Allstate investigators for the month of February, 1963?

Do you know Mr. Takash?

"A. No.

"Q. You don't know Mr. Takash?

"A. I don't know Mr. Takash." (App. 78)

The defense and the government stipulated as to the testimony of the court reporter before the Grand Jury, and that Government Exhibit 11 was a true and correct transcript of the shorthand notes of the testimony of DiGiovanni before the March 1966 Grand Jury, but objected to its admission in entirety except only insofar as it related to the issues and specifically the false statements as charged in the indictment.

The Government then read the entire testimony of DiGiovanni before the Grand Jury to the members of the petit jury over the objection of the defendant. The Government thereupon rested. (App. 92)

The petitioner Carl DiGiovanni took the witness stand in his own behalf and testified that he was married and living with his wife. That he was 41 years of age and for the past 15 years his business was that of a barber. Prior to being employed at his present shop, he was employed by Wally Smith at 753 N. Pulaski Rd., in Chicago, Illinois. The witness testified that his education consisted of grammar school and high school, that he had never been in the military service of the United States but he had been a patient at the Municipal Tuberculosis Sanitarium for two years; that he had never been convicted of any crime. The witness testified that on or about January 16, 1963, he had an automobile accident at Pulaski and Belden Avenue in Chicago, Illinois. It was Wednesday, which was his regular day off. After the accident he had occasion to employ a firm of lawyers and also to get medical attention from a Dr. Martin Sternbach. He continued to work and take treatments in the evening. The only time he was off was February 11, to the 16, 1963 which was some time after the accident. On the 21st day of February, 1963, he recalls that two men came into the barber shop; that he and the owner, Wally Smith, each had a customer

in the chair and that there were one or two customers waiting. He said of the occurrence as follows:

"Two men came into the shop. They asked me if I was injured. I said I was working. 'If you will come back later, I will talk to you.' They never came back.
"Q. Did they identify themselves?
"A. No, they did not."

He testified further that as he was cutting hair he was standing behind the chair facing toward the mirror. The two men were to the right of him near the other barber's chair and that they were a little bit out of line of his vision. He testified that one of the men was slightly behind the other and he does not recall seeing him write anything down. When he talked to the two men he was talking over his right shoulder and that it was not his practice to stop and talk to people while someone was in the chair. To the best of his recollection, he recalled them being in the shop only a minute and a half. He has no recollection of the exact conversation. Then he was asked the following questions and made the following answers:

"Q. Do you have any recollection of the exact conversation between you?
"A. No, I don't.
"Q. That is, between these people who come in to your shop and yourself?
"A. No, that's all I said, what I said before.
"Q. All right. After that time were you ever called upon to give a deposition?
"A. Yes.
"Q. Do you know what a deposition is?
"A. Yes.
"Q. What is it?
"A. Well, it is a legal form typed up by a court reporter.
"Q. With attorneys present?
"A. Yes.

"Q. Did you sign that deposition?

"A. I cannot recall that.

"Q. What is a statement?

"A. A statement would be a legal form typed up by a court reporter being read by myself and signed first.

"Q. Did you sign any such case—any such statement in this case?

"A. No.

"Q. When is the next time you were brought before any group of people?

"A. I was brought before the grand jury.

"Q. When were you brought in for the deposition, do you recall that?

"A. Oh, must have been, gee, about six months before I was called before the grand jury.

"I cannot really recall the dates exactly, the exact dates now.

"You have them.

"Q. Does the 6th of April 1964 mean anything to you?

"A. Yes, now.

"Q. So that the men came in on February 21, 1963 and you gave a deposition on April 6, 1964.

"A. Yes.

"Q. And you were called before the federal grand jury on March 29, 1966, is that correct?

"A. Yes.

"Q. Have you read your testimony before the grand jury?

"A. Yes.

"Q. I gave you a copy of that to read, did I not?

"A. Yes.

"Q. To the best of your knowledge, were you answering those questions truthfully?

"A. Yes, I was.

"Q. When you said that you did not give a statement to investigators from Allstate Insurance Company, what did you mean?

"A. I didn't say anything, I mean, I interpreted the statement to mean something that was typed up, signed up, made by a court reporter and for me to have read the statement and signed it.

"Q. Do you specifically recall any statement that you heard here in court, any language between you people—

"A. No.

"Q. —that is to say, the people who came in to the shop and yourself?

"A. No; no, there was no language. No.

"Q. When did you leave the employment of Mr. Smith?

"A. Oh, let's see, May 31, 1966.

"Q. Now, have you seen the indictment in this case?

"A. Yes.

"Q. Are you guilty or not guilty of that charge?

"A. Not guilty.

"Mr. Jalovic: Objection, your Honor.

"The Court: Well, I think you had better ask him specifically.

"Mr. Calihan: All right, I will ask him, your Honor.

"By Mr. Calihan:

"Q. Mr. DiGiovanni, did you willfully, knowingly and contrary to an oath state that you did not give a statement to a court reporter and an investigator for Allstate Insurance Company on February 21, 1963, well knowing that you did give such a statement?

"A. I gave them no such statement." (App. 99-102)

Thereafter the petitioner produced no other witnesses in this cause and rested his case.

The jury returned a verdict of guilty and the petitioner was sentenced as aforesaid. Upon appeal the U. S. Court of Appeals for the Seventh Circuit affirmed the conviction. (Opinion, App. A, Pages 1a-7a)

REASONS FOR GRANTING THE WRIT

I.

The opinion of the court below in holding that all of petitioner's grand jury testimony must be considered in determining whether the government proved that he falsely denied giving a "statement" constitutes an amendment of the indictment and is in direct conflict with this Court's holding in *Ex Parte Bain*, 121 U. S. 1, *Stirone* v. *United States*, 361 U.S. 212, and *Russell* v. *United States*, 369 U.S. 749.

The United States Court of Appeals for the Seventh Circuit has rendered a decision in this case which in effect amends the indictment. It changes the indictment from a specific allegation of a misstatement of a specific fact on a day certain to a broad general charge with respect to all of his testimony. The petitioner in this case admitted that he talked to the insurance investigators, but stated that he gave them no "statement". That his denial of giving a statement was false was all that was charged in the indictment. The defense at the trial was that the petitioner interpreted the word "statement" to mean a "legal form typed up by a court reporter being read by myself and signed first." The defense was predicated upon the indictment which charged perjury with respect only to the question of whether or not he gave a statement, or whether a statement was taken from him. The Court of Appeals in its opinion, reads the indictment more broadly as referring to all of the petitioner's answers regarding the giving of the statement. That Court held:

> "Significantly, it does not set out specific answers which it charges were false, but charges that in substance the appellant denied giving a statement. Therefore, all of the appellant's grand jury testimony must

be considered in determining whether the government proved that he falsely denied giving a statement."

The petitioner defended on the basis that he had never given a typed, signed document which in his understanding defined statement. All specific questions and answers purportedly coming from the "statement", petitioner similarly denied because in his mind, as he understood "statement", there was none and nothing could be contained in it.

The opinion of the court below is also contrary to a decision of the United States Court of Appeals for the Sixth Circuit in *Stevens* v. *United States*, 206 F. 2d 64. The Sixth Circuit in *Stevens* said that "since the indictment did not restrict itself to the allegations that the appellants did knowingly make a false statement, but proceed to state in detail what constituted the alleged falsity, the government was required to prove the falsity as specifically alleged." In the case at bar, the use of the word "in substance" were used only to obviate the necessity of the exact or verbatim language. However, the meaning is clear. The indictment refers to a specific answer. It refers to the testimony which was "* * * on February 21, 1963, while he was in Chicago, Illinois, defendant gave a statement to a court reporter and an investigator of Allstate Insurance Company concerning his automobile accident on January 16, 1963, in Chicago, Illinois."

The Court below seized on the words "in substance" as permitting the catch-all testimony given by the petitioner before the grand jury. This is not the charge laid in the indictment and constitutes a form of judicial amendment, contrary to this Court's prior rulings on the subject. But if this were not enough, in the opinion below, the Court

of Appeals further demonstrated the fact of judicial amendment. At page 4 of its opinion, (App. A, p. 5a) the Court of Appeals stated as follows:

> "We read the indictment more broadly as referring to all of appellant's false answers regarding the giving of a statement. * * * Therefore, all of appellant's grand jury testimony must be considered in determining whether the government proved that he falsely denied giving the statement."

At page 6a of the same opinion, the court below took a different position in ruling on the petitioner's contention that the trial court erred in its failure to give petitioners instruction as tendered. The instruction related to what consideration should be given the other statements. The petitioner had tendered the following instruction:

> "There has been evidence in this trial concerning other statements made by the defendant; these are not to be considered by you as proving the charge of the indictment, except insofar as such statements may throw light on the motive with which the defendant acted and then they should be considered by you for no other reason than that."

After giving the instruction as tendered, however, the trial court appended the sentence. "But you may consider all of them," without prior notice to petitioner and to which counsel for petitioner objected after the instruction was given to the jury. In order to justify the giving of that addition to the instruction, the Court of Appeals stated as follows: (7a)

> "Appellant contends that the added sentence negatived the preceeding portion of the instruction and invited the jury to return a guilty verdict on the basis of false statements other than those charged in the indictment. We disagree. The import of the whole instruction was that the other statements could be

considered insofar as they reflect the light on appellant's motive *and not proving the charge of the indictment.*"

Thus the Court's opinion on the question of the instruction is diametrically contrary to the earlier portion of its opinion where it attempts to justify the proof of statements not charged in the indictment as supporting the proof of the charge laid. The obvious import of all this is that the Court of Appeals in order to sustain conviction utilized amendment, but in referring to the instruction stated that the same questions and answers could not be considered by the jury as proving the charge in the indictment.

II.

The opinion of the court below, holding that the petitioner's understanding of the word "statement" is irrelevant, eliminates the essential element of intent in perjury cases, and makes the mere fact of inaccuracy a perjury. Mistake, misunderstanding, inadvertence—none will avail to divest of criminality under this decision of the Seventh Circuit. By so ruling, the court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The opinion of the United States Court of Appeals for the Seventh Circuit is in conflict with decisions of other Circuits. Many courts have held that the substance of the crime of perjury is a defendant's lack of belief in the truth of his testimony as of the time he made it. For a jury to conclude that perjury is committed, in fact, it must determine what the words meant to the defendant at the time he offered them as his testimony, and then conclude that the defendant did not at that time believe

in the truth of such testimony according to the meaning he ascribed to the words or phrases he used. The Court of Appeals for the Third Circuit in *United States* v. *Rose*, 215 F. 2d 617, held at 623:

> "Assuming that the defendant made a false statement when he stated that he 'got cash for this check', it is settled that a false statement which is the result of an honest mistake is not perjury. People are prone to use colloquial terms in describing events and in doing so err in failing to adhere to technical terms but such error is insufficient to establish perjury. At most the defendant's statement was equivocal." *U. S.* v. *Rose*, 3 Cir. 215 F. 2d 617, 623.

At a footnote on the same page the court stated:

> "Language used by individuals must be considered in the light of their educational, intellectual and environmental background." *U. S.* v. *Rose*, 3 Cir. 215 F. 2d 617, 623 FN 6.

The Ninth Circuit similarly has held in *Umbriaco* v. *United States*, 258 F. 2d 625, that the witness' impression as to the meaning of certain words could not constitute perjury. The Court held as follows:

> "The witness was evidently under the impression that isolated acts of illicit intercourse for money did not constitute operation as a prostitute and made her general denial of such operations on that ground, at the same time admitting sexual acts with Campbell." *Umbriaco* v. *U. S.*, 9 Cir. 258 F. 2d 625, 627.

The Court reversed the conviction.

In *Blumenfield* v. *United States*, 306 F. 2d 892, the United States Court of Appeals for the Eighth Circuit held:

> "It is perfectly clear that a false statement is an essential element of the offense here charged. The

charge here is of the perjury type. A person cannot be convicted of perjury if his answers are legally truthful. *United States* v. *Slutzky*, 3 Cir., 79 F. 2d 504, 505; *Hart* v. *United States*, 9 Cir., 131 F. 2d 59, 61; *Smith* v. *United States*, 6 Cir., 169 F. 2d 118, 121. In the latter case the rule is stated:

> 'Appellant is right in his contention that there can be no lawful conviction in a perjury case when an answer of the defendant, under oath, to a question propounded to him is literally accurate, technically responsive, or legally truthful'." See also, *Segal* v. *United States*, 8 Cir., 246 F. 2d 814.

Blumenfield v. *U. S.*, 8 Cir., 306 F. 2d 892, 897.

The United States Court of Appeals for the Fifth Circuit held in *Beckanstin* v. *United States*, 232 F. 2d 4 as follows:

> "Moreover, in order to constitute perjury, a false statement must be made with criminal intent, that is, with intent to deceive, and must be willfully, deliberately, knowingly and corruptly false. The positive evidence here all shows that, although the answer was false, the witness had not grasped the form of the question, and had not knowingly or willfully made a false answer with intent to deceive. The circumstances corroborate the positive testimony." *Beckanstin* v. *U. S.*, 5 Cir., 232 F. 2d 4.

In *United States* v. *Wall*, 371 F. 2d 398, the United States Court of Appeals for the Sixth Circuit held:

> "The trouble with this case is that the question upon which the perjury charge was based, was inarticulately phrased, and, as admitted by the prosecution, was susceptible of two different interpretations. In our opinion, no charge of perjury can be based upon an answer to such a question.
>
> "If Mrs. Wall had understood the question to mean whether she had accompanied Swarthout on any trips,

then so far as the record is concerned, her answer was correct and truthful. If the Government desired to elicit proof as to whether Swarthout and she had ever stayed together in a motel room in Miami Beach, or elsewhere, it could easily have phrased a proper question designed to obtain such information.

"Where the defendant is under oath and in response to a question asked of him gives an answer which is literally accurate, technically responsive or legally truthful, he cannot be convicted lawfully of perjury. *Smith* v. *United States*, 169 F. 2d 118 (6th Cir. 1948); *Galanos* v. *United States*, 49 F. 2d 898 (6th Cir. 1931).

"This must be so because the essence of the crime of perjury as defined in the statute is the belief of the witness concerning the veracity of his testimony. *United States* v. *Winter*, 348 F. 2d 204 (2d Cir. 1965), cert. denied 382 U.S. 955, 86 S.Ct. 429, 15 L.Ed.2d 360. In a case where the question propounded admits of several plausible meanings, the defendant's belief cannot be adequately tested and it is necessary to determine what the question meant to him when he gave the disputed answer. *United States* v. *Lattimore*, 127 F. Supp. 405 (D.C.D.C. 1955), aff'd, 98 U.S.App. D.C. 77, 232 F. 2d 334 (1955)." *U. S.* v. *Wall*, 6 Cir. 371 F. 2d 398, 399-400.

In the case at bar the uncontradicted testimony was that the petitioner DiGiovanni when asked about his testimony that he did not "give a statement" and what he meant by his "statement" said:

"I didn't say anything, I mean, I interpreted the statement to mean something that was typed up, signed up, made by a court reporter and for me to have read the statement and signed it."

But at the same time that the petitioner denies making a "statement" he admits that he talked to the people. It is obvious that there was a misunderstanding and the testimony of the petitioner in this respect was literally cor-

rect, insofar as he interpreted the word "statement". The subjective test of perjury makes it quite apparent that the petitioner did not have the requisite intent to commit perjury. The United States Court of Appeals for the Seventh Circuit in holding that the petitioner's "understanding of the word 'statement' is irrelevant" is erroneous. It is contrary to decisions by other Circuits hereinabove cited and represents a departure from the accepted and usual course of judicial proceedings. It, in effect, eliminates an essential element of intent in perjury cases. This Court should exercise its power of supervision and grant the Writ of Certiorari.

CONCLUSION

WHEREFORE, for the above and foregoing reasons, the petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

EDWARD J. CALIHAN, JR.

APPENDIX

SEPTEMBER TERM, 1967—APRIL SESSION, 1968

No. 16372
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
CARL DIGIOVANNI,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 10, 1968

Before SCHNACKENBERG and HASTINGS, *Circuit Judges*, and KNOCH, *Senior Circuit Judge*.

HASTINGS, *Circuit Judge*. Carl DiGiovanni appeals from a judgment of conviction entered May 2, 1967 following a jury trial. The single-count indictment charged that appellant, duly sworn as a witness, willfully and falsely "testified in substance [before a federal grand jury on March 29, 1966] that he did not give a statement to a court reporter and an investigator of Allstate Insurance Company on February 21, 1963, or any other time concerning his automobile accident on January 16, 1963, in Chicago, Illinois." Appellant was committed to the custody of the Attorney General for one year. He is currently at liberty on bond.

Most of the facts are undisputed. On January 16, 1963, appellant was involved in a traffic accident in Chicago with an insured of Allstate Insurance Company. Shortly thereafter, Allstate and its insured received letters from a firm of attorneys purporting to represent appellant in a claim for property damage and personal injuries sus-

tained in the accident. In late February, Allstate received a form, entitled "Statement of Property Damage," signed by appellant. An answer on the form indicated that appellant had not been injured in the accident.

There is a dispute concerning the events of February 20 and 21, 1963. An investigator for Allstate testified that he called appellant on February 20 and appellant told him he was not injured in the accident. The investigator further testified that on February 21 he, with a court reporter, visited appellant at the barber shop where the latter was employed. He questioned appellant while the latter was cutting hair, and the court reporter recorded the conversation. The substance of the conversation, as related by the investigator and shown by the transcript of the reporter's notes, was that appellant suffered no injuries in the accident, that he only wished to be compensated for the property damage to his car, and that his attorneys wanted to make a "big deal" out of it. The investigator's testimony was corroborated in part.

Appellant testified at trial that on February 21, 1963 two men who did not identify themselves and were unknown to him came into the barber shop where he worked. His version of the conversation with the men was that they asked him whether he was injured and that he told them he was working and would talk to them if the came back later.

Appellant was subpoenaed by the March, 1966 federal grand jury for the Northern District of Illinois, which was investigating mail fraud by claimants, doctors and lawyers in presenting automobile insurance claims. Appellant appeared on March 29, 1966. He was accompanied by his attorney, who waited outside the jury room. He was questioned concerning his traffic accident, his injuries and his consultations with a doctor and his lawyers. He then denied that he gave a statement to the Allstate investigator. The indictment charging him with perjury was returned June 2, 1966.

Appellant urges that the trial court erred in denying his motion to dismiss the indictment. The ground for the motion was that appellant was called before the grand jury as a "putative defendant" but was not effectively warned of his right to remain silent. This, he says, required the striking of the alleged perjurous statements on which the indictment rested.

We reject this contention. It is well established that the Government's failure to give Miranda[1]-type warnings to a grand jury witness, even one as to whom the proceedings have become accusatory, does not bar a perjury prosecution for false testimony before the grand jury. See *Cargill* v. *United States*, 10 Cir., 381 F. 2d 849 (1967), cert. denied, 389 U. S. 1041 (1968); *United States* v. *DiMichele*, 3 Cir., 375 F. 2d 959, cert. denied, 389 U.S. 838 (1967); *United States* v. *Rosen*, 2 Cir., 353 F. 2d 523 (1965), cert. denied, 383 U.S. 908 (1966); *United States* v. *Winter*, 2 Cir., 348 F. 2d 204, cert. denied, 382 U.S. 955 (1965); *United States* v. *Parker*, 7 Cir., 244 F. 2d 943, cert. denied, 355 U.S. 836 (1957). This case does not present the situation where an actual or potential defendant is called before a grand jury and, in the absence of the warnings, makes incriminating admissions.[2] We are therefore not called upon to determine the application of *Escobedo* v. *Williams*[3] and *Miranda* v. *Arizona*[4] to admissions made by grand jury witnesses.[5] In the instant case there was no admission, and appellant was a "putative defendant," if at all, only in the sense that the Government anticipated he would perjure himself if called to testify.

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[1] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[2] See generally *Mathis* v. *United States*, ... U.S. ....., 36 L.W. 4379 (1968).

[3] 378 U.S. 478 (1964).

[4] 384 U.S. 436 (1966).

[5] See generally *United States* v. *Luxenberg*, 6 Cir., 374 F. 2d 241 (1967); *United States* v. *DiGrazia*, D.C.N.D. Ill., 213 F. Supp. 232 (1963).

The transcript of appellant's testimony before the grand jury shows that he was effectively warned of his rights. He was told that he had a right to legal counsel to consult with in answering any questions before the grand jury and that anything he might say could be used against him later in a criminal proceeding. The following exchange then occurred:

> "Q. You understand you are waiving your right to testify before this Grand Jury?
> "A. Repeat that.
> "Q. Based on the fact that you understand that anything you say may be used against you at a later date, do you waive your right to testify before this Grand Jury? You have a right to take what is commonly known at the Fifth Amedment, do you understand that?
> "A. Yes.
> "Q. Do you waive that right?
> "A. I don't want to take the Fifth; I want to tell the truth.
> "Q. We want the truth?
> "A. Yes."

This excerpt indicates that, however awkwardly, appellant was effectively advised of his right to remain silent.

Appellant next contends that the Government failed to prove the offense charged in the indictment. The indictment charged that appellant falsely testified in substance that he did not "give a statement." His defense at trial was that he interpreted the word "statement" to mean "a legal form typed up by a court reporter being read by myself and signed first." Appellant relies on the principle stated in *United States* v. *Wall*, 6 Cir., 371 F. 2d 398, 400 (1967):

> "Where the defendant is under oath and in response to a question asked of him gives an answer which is 'literally accurate, technically responsive or legally truthful,' he cannot be convicted lawfully of perjury. *Smith* v. *United States*, 169 F. 2d 118 (6th Cir. 1948);

Galanos v. *United States*, 49 F. 2d 898 (6th Cir. 1931)."

Appellant interprets the indictment as charging perjury with respect only to the questions whether he "gave a statement" or whether a "statement was taken" from him. We read the indictment more broadly, as referring to all of appellant's false answers regarding the giving of the statement. Significantly, it does not set out specific answers which it charges were false, but charges that *in substance* appellant denied giving a statement. Therefore *all* of appellant's grand jury testimony must be considered in determining whether the Government proved that he falsely denied giving the statement. See *Conrad* v. *United States*, 5 Cir., 255 F. 2d 247 (1958).

The transcript of appellant's testimony before the grand jury shows that after he denied "giving a statement," the Assistant United States Attorney read each of the questions and answers from the transcript of the February 21, 1963 conversation with the Allstate investigator. After reading each question and the corresponding answer the Assistant asked: "Was that question put to you and did you give that answer?" Appellant answered "no" to each of the Assistant's questions. These answers were false and were unaffected by appellant's claimed misinterpretation of the word "statement." The transcript of his testimony before the grand jury clearly shows that he denied having the conversation with the Allstate investigator. His testimony was neither literally accurate, technically responsive nor legally truthful. Whatever his semantic difficulties with the word "statement," they did not affect the substance of his testimony.

Appellant further complains that the trial court erred in refusing to give certain instructions and in appending an inconsistent sentence onto another instruction.

The essence of the four instructions rejected was: 1) that the Government must prove beyond reasonable doubt the nonexistence of any other plausible legal explanation

for appellant's statement; 2) that appellant was not guilty if his statement was legally truthful under any plausible theory; 3) that appellant was not guilty if he did not understand the questions and gave unresponsive answers, and 4) that appellant's intellect, education and environment should be considered in determining whether he was mistaken in his answers. The trial court gave instructions substantially the same as 1) and 2). The rejected instructions were designed to place before the jury the defense of mistake as to the meaning of the word "statement."

Appellant relies upon the principle that a defendant is entitled to have the jury instructed on any theory of defense for which there is foundation in the evidence. We approve that principle. See *United States* v. *Clancy*, 7 Cir., 276 F. 2d 617, 636 (1960), *rev'd on other grounds*, 365 U.S. 312 (1961). However, it has no application here. As we interpret the indictment, appellant's understanding of the word "statement" is irrelevant. The evidence affords no foundation for a finding that appellant misunderstood all the relevant questions put to him before the grand jury. His most damaging answers were given to the series of questions: "Was [each of the questions on the Allstate transcript] put to you and did you give [each of the answers on the transcript]?" Appellant does not and could not contend he did not understand those questions.

The trial court instructed the jury that to convict it must find beyond a reasonable doubt that appellant falsely testified *in substance* that he did not give such a statement. The court then gave this instruction tendered by defendant:

> "There has been evidence in this trial concerning other statements made by the defendant; these are not to be considered by you as proving the charge of the indictment, except insofar as such statements may throw light on the motive with which the defendant acted and they should be considered by you for no other reason than that."

and appended the sentence: "But you may consider all of them."

Appellant contends that the added sentence negated the preceding portion of the instruction and invited the jury to return a guilty verdict on the basis of false statements other than those charged in the indictment. We disagree. The import of the whole instruction was that the other statements could be considered insofar as they reflected light on appellant's motive, not as proving the charge of the indictment.

Finally, appellant complains that the trial court should have granted a mistrial after the Assistant United States Attorney during his final argument accused defense counsel of a "cheap trick." During cross-examination of the foreman of the March, 1966 grand jury defense counsel asked the witness if he had ever made a statement in the case. The witness answered that he had not. In his closing argument defense counsel called the jury's attention to the witness' answer and the fact that the witness' testimony was being recorded by the court reporter as he spoke. It was this that the Assistant called a "cheap trick." When defense counsel objected to the characterization, the court denied his motion for mistrial, but stated that "The words 'cheap trick' may go out." It is appellant's contention that the Assistant's comment and the court's mild rebuke destroyed the viability of the mistake defense.

We cannot agree that the Assistant's "indelicate" remark requires reversal of appellant's conviction. However mild the rebuke, the trial court struck the remark. Furthermore, since we have held appellant's mistake defense not to be viable, it is of no consequence that the remark may have destroyed it.

The judgment of conviction appealed from is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Monday, June 10, 1968

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

Hon. JOHN S. HASTINGS, *Circuit Judge*

Hon. WIN G. KNOCH, Senior Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CARL DIGIOVANNI, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 16372

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Monday, July 15, 1968

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

Hon. JOHN S. HASTINGS, *Circuit Judge*

Hon. WIN G. KNOCH, Senior Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CARL DIGIOVANNI, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 16372

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.